No. 87-1661

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ASARCO INCORPORATED, CAN-AM CORPORATION, MAGMA COPPER COMPANY, and JAMES P.L. SULLIVAN,
Petitioners,

v.

FRANK and LORAIN KADISH, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

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REPLY BRIEF FOR PETITIONERS

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May 31, 1988

TABLE OF AUTHORITIES

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As is demonstrated in the petition, the Supreme Court of Arizona has decided an important question of federal-state relations that has not been, but should be, settled by this Court. Respondents' brief in opposition does nothing to undermine that showing.

1. Respondents repeatedly mischaracterize the issue presented. It is not whether the revenues obtained from the lease of mineral lands granted to the State of Arizona should be held in trust for the benefit of the state's public schools or whether the state as trustee should administer its leasing program for trust lands in accordance with the purpose of the trust. (*See* Resp. Br. i, 5,

8, 12.) Such revenues unquestionably are held and exclusively used for the benefit of the school system as was intended, and the lands are administered by the state for the benefit of the public schools. The issue is whether the restrictions in the Enabling Act of 1910 that Congress imposed on the disposition of nonmineral lands granted to the State of Arizona apply as well to the lease of mineral lands that Congress did not grant to the state by that act. The most significant of these restrictions is a requirement that "[a]ll lands, leaseholds, timber, and other products of land, before being offered," be appraised to determine their "true value" and that no disposition be made for less than the value so ascertained. Pub. L. No. 219 (ch. 310), § 28, 36 Stat. 557, 574 (Pet. 51a).

In the Jones Act of 1927, which constitutes the grant of mineral lands to the western states, Congress provided that mineral deposits "shall be subject to lease by the State as the State legislature may direct." Pub. L. No. 570 (ch. 57), § 1, 44 Stat. 1026, *codified as amended at* 43 U.S.C. § 870 (Pet. 46a). Respondents' essential claim—that the legislature has failed to realize sufficient revenues from mineral leases—is thus properly directed to the legislature, which in establishing the royalty rate for mineral leases may properly consider such factors as the disincentive that higher or variable rates might have on mineral exploration. Respondents' contention provides no basis for denying that the legislature has the leasing authority Congress so plainly conferred on it or for limiting that authority by restrictions that Congress chose to impose only on the disposition of nonmineral lands and surface assets which, unlike mineral deposits, typically can be appraised without lengthy and costly exploration and development.

Similarly, respondents' effort to portray the Arizona leasing system as a give-away is wide of the mark. (Resp. Br. i, 3, 5.) As is shown in the petition (Pet. 5),

the mineral leases authorized by state statute for up to twenty years are a source of substantial revenues to the state. Moreover, despite respondents' suggestion to the contrary (Resp. Br. 2), the Supreme Court of Arizona specifically stated that there was no evidence that Arizona's use of a net value basis for calculating the amount of royalties due ever resulted in mineral extraction without any payment to the state (Pet. 26a), even when a mineral deposit is unimportant. Beyond that, however, the responsibility for deriving appropriate revenues from mineral leases was precisely what Congress determined, in enacting the Jones Act, could be best discharged by the Arizona legislature, and the legislature of each of the western states, taking fully into account local resources and mining conditions.[1]

2. As respondents acknowledge (Resp. Br. 3), the various states have adopted a broad range of leasing methods. It was the clear congressional purpose in the Jones Act that the choice among methods should be that of each state rather than a centralized determination by the federal government. It was only with respect to nonmineral lands that Congress chose to impose specific dispositional restrictions. If followed by other courts, the decision of the court below could strip other western states of their broad leasing authority under the Jones Act and require them to observe dispositional restrictions that Congress believed appropriate only for nonmineral lands. Respondents' claim that those other potentially affected western states already treat mineral lands as trust lands (Resp. Br. 6, n.2) is not responsive

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[1] The Arizona Legislature recognized that in order to induce miners to prospect for, explore and develop mineral deposits on state land, they must be assured that, if successful in discovering a mineral deposit, they will be able to obtain a lease with a set royalty. The present Arizona royalty statutes give a lessee assurance that he may expend money knowing that for the twenty-year term the royalty rate will not change.

to this point. Arizona, too, treats its mineral lands as trust assets, but the decision of the court below goes far beyond that undisputed duty of the state and requires Arizona to follow the very specific dispositional requirements contained in its Enabling Act, including prior appraisal of each particular site before leasing. If extended in similar fashion to other states, such a holding could upset leasing systems involving large amounts of school lands in other western states. (*See* Pet. 9.)

3. Nothing respondents say about the decision in *Jensen* v. *Dinehart*, 645 P.2d 32, 35 (Utah 1982), explains away the conflict between the decision of the Utah Supreme Court in that case and the decision of the Arizona Supreme Court in this case over the meaning of the Jones Act. Either that statute grants mineral lands to the states with authority to lease them without regard to the specific restrictions in each state's enabling act applicable to nonmineral lands, as the Utah court held, or it imposes by incorporation those specific restrictions on the lease of mineral lands, as the Arizona court held. Put in other terms, either the Utah court was right in saying that the purpose of the Jones Act, manifested in its grant of authority to lease mineral lands "as the State legislature may direct," was to free mineral-bearing school land sections granted to Utah "from any restriction or limitation that may have theretofore existed, except as to use for public schools," 645 P.2d at 35, or the Arizona court was right in saying that Congress, in providing in the Jones Act that the grant of numbered mineral sections "shall be of the same effect" as prior grants of nonmineral sections, meant to incorporate all those enabling act restrictions and limitations (Pet. 9a-10a). Respondents trivialize the jurisprudence of conflicts in attempting to distinguish the Utah case on the ground that the enabling act limitation it held inapplicable was a requirement that proceeds of the state's disposition of nonmineral lands be put into a permanent

(not currently expendable) school fund while in this case the restriction held applicable was the Enabling Act's requirement of prior appraisal. That is not a difference that makes one decision consistent with the other.

4. Respondents fail to show how the decision of the Supreme Court of Arizona properly interprets the relevant federal acts. The Jones Act, as just noted, expressly authorizes each affected state to lease mineral deposits "as the State legislature may direct," and Arizona's Enabling Act has been amended similarly to relieve mineral leases of the prior appraisal requirement applicable to the disposition of nonmineral school lands (*see* Pet. 10-16). The language of the Jones Act that "the grant of numbered mineral sections under this Act shall be of the same effect as prior grants" (Pet. 46a) does not derogate in any way from the broad leasing authority conferred on the states by express provision in that act. Congress chose "the same effect" phrase merely to effectuate its intent that full title to mineral lands would pass to the states without federal reservation of rights to the lands or mineral deposits therein, which was a concern of the legislators in framing the act. *See, e.g.*, S. Rep. No. 603, 69th Cong., 1st Sess. 1-7 (1926); Hearings on S. 564 Before the House Comm. on Rules, 69th Cong., 2d Sess. 11, 12, 13 (1926). Contrary to respondents' contention (Resp. Br. 11 n.7), no other provision of the Jones Act conveys that central point. By its use of language expressly permitting state legislatures to direct the manner of leasing mineral lands, Congress clearly intended to give each state broad discretion to impose its own conditions on the leasing of those trust lands so long as the proceeds are used for the benefit of the public schools. (*See* Pet. 13-14.)

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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